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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ADRIAN O., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN O.,

Defendant and Appellant.

D073962

(Super. Ct. No. J241082)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Reversed in part and remanded with directions.

Rachel Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

Adrian O. appeals from orders issued by the juvenile court under Welfare and Institutions Code¹ section 602 determining that he made criminal threats in violation of Penal Code section 422. He contends that the court erred by failing to declare explicitly whether the offenses were felonies or misdemeanors as required by section 702 and California Rules of Court,² rule 5.780(e)(5). We agree and therefore remand the matter for the court to exercise its discretion to make that determination.

I. FACTUAL BACKGROUND

A. *The People's Case*

On the night of March 17, Adrian was at his house in a rural area with his friends, Colton, John, and another. There were no adults present. The boys smoked marijuana, except for Adrian. Colton saw Adrian take some pills, which Colton believed to be Adderall and Xanax. After taking the pills, Adrian wanted to fight. At one point, Adrian grabbed something silver, possibly a butter knife, and pointed it at Colton as he said, "Fuck you." This made Colton feel "disrespected, scared and pissed."

When Colton and John entered John's car to leave, Adrian got into the back seat, shook Colton's seat, uttered profanities at Colton, and urged Colton to fight. Adrian exited the car, punched the passenger side window and door where Colton was sitting, and again challenged Colton to fight.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² References to rules are to the California Rules of Court.

The next morning, Colton called Adrian and asked him, "Why did you do that?" The two exchanged several phone calls and continued arguing. Adrian was angry and told Colton he had a gun and was going to "roll up, shoot [Colton] [in the head] and [his] family." Afraid that Adrian might hurt his family, Colton told his father, James, that Adrian had just threatened to blow his head off. James asked Colton to call Adrian so he could speak with him. Colton dialed Adrian's number and handed the phone to his father. James testified that Adrian "yell[ed] at the top of his lungs, and said, I'm going to blow your F'ing head off, and then I'm going to come kill your whole family." Adrian said, "I've got the gun in my hand, and you know which one I'm talking about."³ James repeatedly told Adrian, "[T]his is Jim, Colton's dad. This is not Colton." Adrian finally stopped, said he didn't care, and that he was on his way over. Extremely concerned for his family's safety, James called the police.

Sheriff's deputies arrived about 30 minutes later and, after speaking with James, subsequently arrested Adrian for making criminal threats.

B. The Defense Case

Adrian denied taking Xanax and Adderall. He also denied threatening Colton or anyone else with a knife. Adrian testified that on the night of March 17, he, Colton and the others drank alcohol and everyone was intoxicated. An hour later, M.J. (Colton's former girlfriend, who was now dating Adrian) called Adrian to tell him Colton was suspicious that Adrian was seeing her. She said Colton was talking "shit" about Adrian.

³ About four months previously, James's handgun was stolen from his home, and he was concerned Adrian had the gun.

Adrian confronted Colton, stating, "I gave you liquor, alcohol and stuff. And you're just talking shit . . . about me." Adrian told Colton he was having sex with M.J. and that she was going to take him to Mexico. Colton cried. Adrian testified that everyone left his house about 15 minutes later, and he went to sleep.

Adrian testified that the next morning, Colton called him and was upset that Adrian was being intimate with his girlfriend. Adrian replied, "Fuck you," and hung up. Colton texted Adrian, "Stay where you're at." When Adrian called Colton back, Colton said he was "in Esco. I'm coming back. I'm coming to your house with the boys."

Adrian testified that he believed Colton was coming over to kill him. He thought Colton was going to "fuck up my house, like rob me, kill me." He told Colton, "If you're coming over to kill me, I'm going to get my gun out of my family's safe at my mom's house."

Adrian testified that in fact, there were no guns at his mother's house and admitted he lied to Colton about the gun. Adrian admitted, however, that he threatened to shoot Colton.

After Adrian hung up, Colton's father called Adrian. Adrian testified he was "feeling strong" and said, "What's it to you?" James replied, "Watch that tone with me." Adrian replied, "Fuck you," and told him he was sleeping with Colton's girlfriend and hung up.

Adrian denied threatening to shoot Colton's father.

C. The Juvenile Court's Ruling and Disposition

The court stated that it did not believe Adrian's testimony and made a true finding that Adrian made criminal threats as alleged. The court added, "I find that the People have proven Counts 1 and 2 by the standard required by law. . . . I find the People have

proven their case beyond a reasonable doubt. [¶] Count 1. These are separate and distinct felonies. Three years for Count 1. They're both three-year felonies."

At the subsequent disposition hearing, the court advised Adrian that the maximum term of confinement is three years eight months and imposed home supervision/GPS pending a "Breaking Cycles" commitment not to exceed 150 days.

DISCUSSION

I. *THE JUVENILE COURT FAILED TO STATE ON THE RECORD THAT IT HAD CONSIDERED THAT ADRIAN'S OFFENSES WERE WOBBLERS*

A. *Applicable Law*

The crime of making a criminal threat is a "wobbler," which means it can be treated, in the court's discretion, as either a felony or a misdemeanor. (Pen. Code, §§ 17, subd. (b)(1), 422, subd. (a).) Section 702 provides that when a "minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." In part, section 702 serves an administrative purpose, providing a record from which the maximum term of physical confinement may be determined in the event of future adjudications. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1205 (*Manzy W.*).) Section 702 also "ensur[es] that the juvenile court is aware of, and actually exercises, its discretion under [section 702]." (*Manzy*, at p. 1207.)

Section 702 requires an express declaration of whether a "wobbler" offense is a misdemeanor or felony. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) "[N]either the pleading, the minute order, nor the setting of a felony-level period of physical

confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*Id.* at p. 1208.) It is also not enough that a petition describes an offense as a felony and the juvenile court finds the allegations of the petition to be true. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619-620.) When a juvenile court fails to comply with section 702, the cause may be remanded with directions to determine the character of a sustained offense. (*Kenneth H.*, at p. 620.)

Rule 5.780(e)(5) implements section 702 by additionally providing: "If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration*, and must state its determination as to whether the offense is a misdemeanor or a felony." (Italics added.) The juvenile court may defer making these determinations until the disposition hearing, in which case rule 5.790(a)(1) imposes the same requirement that the court "must consider which description applies and must expressly declare on the record that it has made such consideration" ⁴

B. Analysis

Adrian contends the juvenile court did not comply with section 702 and rule 5.780(e)(5) because the court did not expressly declare on the record that it had considered whether to treat the offenses as misdemeanors or felonies. We agree.

⁴ Rule 5.795(a) similarly provides that the court "must find and note in the minutes . . . whether it would be a felony or a misdemeanor had it been committed by an adult," unless determined previously, and if any offense may be found to be either a felony or a misdemeanor, the court "must consider which description applies and expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony."

Here, nothing in the record indicates that the juvenile court was aware that Adrian's offenses could be either felonies or misdemeanors. In the section 602 petition, both offenses were charged exclusively as felonies. Additionally, the probation report referred exclusively to the criminal threats as felonies, never mentioning that they could also be misdemeanors. At the jurisdictional hearing, the court stated that the offenses were separate and distinct felonies. The minute order from that hearing refers to the charges exclusively as felonies.

At the disposition hearing, neither the minute order nor the reporter's transcript refer to the charges as either felonies or misdemeanors. To the contrary, both in the reporter's transcript and in the minute order, the court confirmed that the maximum custodial time associated with the sustained charges was three years eight months, which is consistent with treating the criminal threats offenses exclusively as felonies.

Disagreeing with this result, the People contend that the juvenile court complied with section 702 and rule 5.780 because during the jurisdictional hearing, the court stated that the offenses are "separate and distinct felonies," "both three-year felonies," and the minute order from the jurisdictional hearing states "the minor is in violation of Count 1, PC422, a felony; and Count 2, PC422, a felony."

Furthermore, the People point out that the court is not required to state its reasoning or rationale. (*In re Jacob M.* (1989) 210 Cal.App.3d 1178, 1180 ["The statute by its terms demands only a declaration—a statement of the existence of either a felony or misdemeanor."].)

However, while stating that the offenses are felonies may comply with section 702, it does not comply with rule 5.780(e)(5). Rule 5.780(e)(5) requires more than a mere statement that a wobbler is being treated as a felony or a misdemeanor. Rule 5.780(e)(5) requires that the court must (1) "consider" which description applies (felony or misdemeanor), (2) "expressly declare on the record that it has made such consideration," and (3) state its determination as to whether the offense is a misdemeanor or a felony. By stating the offenses were felonies, the juvenile court complied with only this last requirement in rule 5.780(e)(5).

In a related argument, the Attorney General also contends that declaring each offense a "felony," in itself is evidence that the court exercised its discretion and that courts are presumed to have properly exercised their discretion. (See Evid. Code, § 664). However, rule 5.780(e)(5) requires that the juvenile court "expressly declare on the record" that it is aware of its discretion to treat an offense as a wobbler and that it has made a determination to treat any particular offense as either a misdemeanor or a felony. Accordingly, we cannot rely on otherwise applicable presumptions from a silent record.

C. Harmless error

We turn now to the question of whether the court's error in failing to comply with rules 5.780 and 5.790 can be considered harmless. We are guided by *Manzy W.*, where the court held that a juvenile court's failure to comply with section 702 does not invariably necessitate remand and stated the following principles for determining when remand was required: "[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and

exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. . . . The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

Applying this analysis here, nothing in the record shows that the juvenile court was aware of its discretion to treat each of Adrian's offenses as either a felony or a misdemeanor. The People do not claim the record contains such a declaration, and we have found none. The juvenile court did not at any time during the jurisdictional or disposition hearings refer to its discretion to declare the offenses misdemeanors, neither the prosecution, defense counsel, nor the probation officer pointed out to the court that it had such discretion; and the report of the probation officer, although it referred to the instant offenses as felonies, did not indicate that they could be misdemeanors. Accordingly, we conclude the court's failure to comply with rules 5.780(e)(5), 5.790, and 5.795(a) was prejudicial.

DISPOSITION

The matter is reversed and remanded to the juvenile court with directions to clarify whether the criminal threats offenses, violations of Penal Code section 422, are felonies or misdemeanors, and to adjust the disposition if necessary. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.